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Louise Arbour

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THE STATUS OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA: GOALS AND RESULTS

*Louise Arbour**

My ambition in this extraordinary venture deals with the workings of two *ad hoc* tribunals (the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)) and the creation of a permanent international criminal court. My ambition is to create a forum that will draw from the best standards of criminal practice throughout the world in order to apply the contributions of domestic judicial systems to the world environment. If successful, criminal justice could eradicate the most outrageous violations of human rights.

In the field of international humanitarian law, some of the most horrendous crimes have been committed with impunity because of shortcomings in the domestic criminal justice systems. However, since Nuremberg the domestic criminal law environment has changed very dramatically. Changes in the length of domestic trials and of *ad hoc* international criminal trials held in the Hague testify to the vast difference in the legal environment since Nuremberg. Disclosure practices and standards are another notable difference since Nuremberg. I can assure you that in the ICTY and in the ICTR we are now held to disclosure practices and standards that were unknown even a decade ago. For example, we have to turn over huge amounts of evidence including open source information which we have an obligation to translate and to make available to the defense.

* Prosecutor International Criminal Tribunals for Former Yugoslavia and Rwanda; B.A. College Regina Assumpta; L.L.L. Faculty of Law, University of Montreal; Doctorate of Laws (*Honoris Causa*), York University 1995 and University of Ottawa.

I would like to give you a very brief update on the health of the ICTY and the ICTR *ad hoc* tribunals. I will emphasize the events that took place in the last six months particularly in the summer of 1997. In the case of the ICTY, arrests took place in Eastern Slavonia and in Prijedor. In the case of the ICTR, an arrest took place in Nairobi where all eight accused were apprehended. They were not all accused at the same time. Some were apprehended under a different procedure. Essentially these events of the last six months have permanently dispelled any notion of the impotence of these two institutions.

I can assure you that in my own office the mood has changed considerably from what it was when I arrived last Fall. At that time, the talk coming to us from the media was very often of doom and doubt. The media questioned the very survival of these two institutions. Now I do not hear many of the questions once raised about the survival of the tribunals, and I am very encouraged by that change.

In my view as a lawyer, the other event that is extremely significant is the legal initiative launched last January when we sought the issuance of a subpoena to compel the production of documents both from the Republic of Croatia and, personally, from its Minister of Defense. I believe this may be the single most important issue that I will have to address in my term of office as Chief Prosecutor. The subpoena to compel documents was sought in the case of the Prosecutor against General Tihomir Blaskic. This summer a favorable decision was reached for the Prosecution by the trial chambers. This matter is presently under appeal. This is an absolutely critical phase in the development of the ICTY. If I may use the colorful image used by President Cassese in describing the Tribunal, which he called a giant without arms or legs, I am determined to do what I can to put these limbs in place.

We face difficulties with respect to the arrest of indictees. The enormous, but less well known, difficulties we face are in accessing the evidence upon which to convict indictees. Both these issues have a direct link to the reliance of the two tribunals on State cooperation and to the inevitable limits imposed upon the Tribunals because of this mode of operation. Although the mandate of the Tribunals is to prosecute individuals on the basis of their personal criminal liability, I think we must never lose sight of the fact that the harm that the Tribunals are designed, in part, to address, is a

harm that was perpetrated at the hands of the State either through its collusion or through its impotence. This is the environment in which these Tribunals currently operate.

I think it has now been demonstrated beyond a reasonable doubt that States will always behave in what they perceive to be their best self interest (rhetoric aside). What States say pales in comparison to States' deeds, and their deeds are exclusively dictated by their perceived self interest. The difficulties that we have encountered in having to rely essentially on State cooperation for arrests and for access to evidence accounts for the vulnerability of the Tribunals which are dependent on political interests. There is only so much that can be done internally to minimize that dependency. However, I believe that it is essential for me, as a Prosecutor, to take every initiative to diminish that dependency and to install the self-sufficiency of the Tribunals.

Recourse to sealed indictments was a clear step in the direction of self-sufficiency of the Tribunals. We properly denounced the unconscionable lack of support given to us from States and from the broader international community. However, we should not expect any better from the States because of their clear self interest in not seeing criminal justice succeed. By not publicizing ahead of time the existence of an indictment, we were able to marginally improve the problem of State and international community cooperation. But sealed indictments can not do much for the indictments that are already in the public domain.

It is a pretty simplistic proposition, but true and effective, that an encounter leading to an apprehension will be somewhat facilitated if the target is unsuspecting of the possible intervention. It is a basic principle of domestic criminal justice, and yet, it seems to be perceived in the region as though we had launched a Star Chamber operation of secret lists. I doubt that any domestic criminal justice system would feel that it is appropriate to issue a televised warning that an operation is imminent to arrest a suspect who has demonstrated an unwillingness to surrender.

The interests of criminal justice have been made sadly subservient to other very legitimate and laudable interests in the peace building process in Bosnia. I believe that for many of the stakeholders in the Bosnian peace process (and here I exclude the victims of war crimes), criminal justice is a mere instrument that needs to be coordinated with, and be subordinated to, other initiatives to

rebuild democracy. It is absolutely clear in the minds of most of these stakeholders (excluding the victims) that the necessity to hold elections should triumph at all times and in all circumstances over the progress of international criminal justice. I find it extraordinary to claim a priority over means to achieve an end. It is also extraordinary to claim that some means should be relinquished or at least neglected. According to that principle very little progress can be made with respect to the apprehension of war criminals. In short, there is a notion that the process of criminal justice is a sort of irritant to the peace process. This notion exists even in the minds of those who, in some abstract way, believe that breaking the culture of impunity and bringing war criminals to justice is a good idea. But for them it is never the right time or there are never the right circumstances to bring war criminals to justice. The criminal justice process itself is perceived as disturbing. In response to that I say: "Welcome, to criminal justice." The unfolding of the domestic criminal justice process IS very disturbing. It is profoundly disturbing to victims and witnesses who have to relive publicly a very traumatic event, to have to submit themselves to brutal cross-examination and sometimes to ridicule. It is very disturbing to the victims and to their families when only some have survived. It is very disturbing to social order which is very often rattled by the exposure of racial hatred at the underbelly of the society in which we live. There has never been a claim that criminal justice, as it is unfolding, is a peaceful and serene process. But we believe that criminal justice is a long term investment, to achieve a peaceful society. We have to go through the motions, painful as they are, if we are going to utilize this mechanism of conflict resolution.

I find it personally appalling to suggest that the participation of SFOR troops in arrests would jeopardize the fundamental operational principal of evenhandedness and that arrests should, therefore, yield to the higher imperative of the maintenance of the peacekeeping operation. I find it appalling to suggest that arresting a person, who happens to be of a particular gender or ethnic origin, breaks the principal of evenhandedness. I think it is clear that when SFOR performs an arrest, it takes sides. It takes the side of justice, which is exactly where SFOR should be.

Relief from dependency of State cooperation will be achieved, in part, by legal initiatives that we have launched. There is, however, no guarantee that we will be successful on each one of these

initiatives, yet I believe that it is my duty to advance every plausible, credible, legal argument within my power to break the unhealthy dependency on State cooperation. State cooperation will continue to be the mode of operation of the Office of the Prosecutor with its numerous partners — international organizations, NGOs, and governments — which are supportive not only in their rhetoric but in their deeds, and without whom the Tribunal clearly could not function. But one has to confront the limits of State cooperation and to consider the legal means utilized to overcome the lack of State cooperation.

It is also clear that legal initiatives are not the only mechanism to resolve the lack of State cooperation. I can now testify to the fact that we are crippled in our efforts to make progress toward voluntary surrender because of the prospects of very lengthy pre-trial custody for the accused. If one were to consider a bargaining position for the Office of the Prosecutor with respect to voluntary surrender, there is virtually nothing to bargain for. The people whom we want to arrest, or who should surrender, are extremely poor candidates for bail. They are charged with the most heinous offenses known to mankind. We have very little means of keeping them on the kind of legal leash that a State normally has when it puts a person under an order of pre-trial release. In virtually every case I would have to be in court resisting bail applications, even though each one is examined on a case by case basis.

Absent access to bail, the question of the length of pre-trial detention is a very critical one. Until we have financial resources that will allow us to move these cases through our court more expeditiously, the courtroom staff is depriving itself of a nonviolent method of bringing the accused to trial, that is, by their voluntary surrender. And I am hoping to be able to persuade our institutional source of funding, the United Nations Budgetary Committee, that better resources would facilitate the issue.

Let me say a few things about the International Criminal Tribunal for Rwanda. Many of the issues and legal initiatives that I have highlighted here with respect to the ICTY apply to the ICTR as well. For instance, even though it received very little attention, the use of sealed indictments was a strategy that we also pursued in the Rwanda Tribunal. The use of sealed indictments is a procedure by which people are apprehended, and an indictment is brought forward later. Of the people arrested in Nairobi, as I indicated

before, some were arrested prior to indictment. But some of the eight were actually indicted, and the indictment was kept under seal. This was done because we were persuaded that if we had publicized the existence of the indictment after it was confirmed by a judge, it would certainly have jeopardized our capacity to arrest the accused. It would have completely rendered impossible the arrest of their friends who would have been put on notice that an operation was underway. Therefore, we used exactly the same technique in Rwanda as in Yugoslavia. Our success, if we achieve it in the Chamber of Appeals, with respect to access to documents and testimonial evidence, will benefit both Tribunals.

The main problem, in the case of the Rwanda Tribunal, is to break its isolation. Even within Africa the Tribunal's work is not as well known as it should be. In fact, until the success of this summer, the image of the Tribunal within Rwanda was just abysmal. There was an enormous amount of difficulty in bringing the work of the Tribunal to the attention of the people who have a primary interest in seeing the Tribunal succeed. So isolation is clearly a big problem.

The second problem in the Rwanda Tribunal is staffing in the Office of the Prosecutor. We still have an incredible vacancy rate. It is caused, in part, by the fact that we are seeking professionals, attorneys and investigators who can function with some fluency in both French and English. For historical reasons, of course, most of the victims and witnesses that we deal with, and the vast majority of documents, and especially open source documents, are in French. However, the environment in which we operate, the office environment and the interaction with the present government, is all in English. Thus, there is a real need for people who can function in both languages. We are very severely understaffed because of the impediment of language capabilities and the difficulty in recruiting people to work in a very challenging environment. To a large extent understaffing accounts for the slowpace of the legal process with which I am still not satisfied. We relaunched an investigative strategy that is now, in my view, much better targeted to prosecuting the accused in leadership positions. Moreover, we have launched a much more vigorous attempt at prosecuting gender-based sexual violence.

The key policy that I intend to pursue at least in the short run is to strengthen the links between the two Tribunals. I believe that the need for better and stronger links will become more apparent

when the Chamber of Appeals, which is joint to both Tribunals, actually starts to perform its role. But until we get to that point, I am determined to put into practice the obvious fact that we are each other's best friends. Although these two Offices of the Prosecutor share a common Prosecutor, the staff of the two Tribunals is very different. My staff for the Rwanda Tribunal is based in Kigali, whereas the Yugoslav Tribunal staff is in the Hague. Nevertheless, the issues which the two Tribunals face on a daily basis are common to a large extent. We share the same goals, and are each other's best resource.

Critical for the success of these two *ad hoc* Tribunals are those issues that should be at the forefront of the minds of those who are working towards a permanent international court. If and when we have a treaty-based permanent international criminal court, we will have experienced basically three models of international criminal justice. First is the Nuremberg model, which I would now characterize by its potency as the trial of the victors. There were no questions about the empowerment of that Tribunal. It had the people it was trying in custody. The Nuremberg Tribunal was working in a potent environment and could certainly function in a very robust fashion.

The ICTY and ICTR *ad hoc* Tribunals are at a considerably lower level of potency than the Nuremberg Tribunal. However, the ICTY and ICTR are potentially more robust than a treaty-based court would be. That is something I think one ought to consider very seriously. The *ad hoc* Tribunals were created under Chapter Seven of the United Nations Charter as a subsidiary organ of the Security Council. In terms of international institutions that is just about as potent as you can be. Despite that power, look at how the two *ad hoc* Tribunals are operating! After denouncing to the Security Council the lack of cooperation of some States, the Tribunal has encountered a considerable amount of difficulty in overcoming that lack of cooperation. So one has to be very aware of the limits of an essentially consensus-based court, a court based on treaty. One has to be aware of how such a court should arm itself in order to overcome the inevitable resistance to its successful operation and the desire by the local community to undermine the operation of the Tribunal when the State is actually called into play in a real case environment.

Another issue that is critical to the future of international justice is the recognition by the military of its ownership of international humanitarian law. International humanitarian law is military law. I have had opportunities to say this, and I repeat it in every environment in which I can get this message across to the military. International humanitarian law is the law that distinguishes a soldier in action from the common murderer. When the military is called upon to intervene in peace keeping operations in a post conflict environment in which war crimes are likely to have been committed, criminal justice should be the brokerage fee. The cost of doing business with the military is a vigorous, relentless search and apprehension of indicted war criminals. Until we get that kind of culture engrained in the military, I believe that we will very often face the difficulty that we face now with the implementation of criminal justice. We would be in a very different legal environment today if the SFOR operation had taken the position right from the beginning that as soon as arrest warrants were issued they would be immediately executed, one after the other. In part, I believe that voluntary surrender would have become a considerably more attractive option for many indictees than it is now. So the question of penetrating military culture is absolutely critical.

The building of the legitimacy of criminal justice is also absolutely key. We take the legitimacy of criminal justice for granted in our domestic setting, but it would be foolish to expect the legitimacy of criminal justice to be widely shared around the world. There are many people who have to interface with international criminal justice but who have never in their entire life been exposed to a justice system in which they had confidence; or to a system that is honest and not open to political interference or to corruption. It is the daily experience of many people in this world that domestic justice generally, including criminal justice, is very much in the hands of political interest. Why should they believe me when I tell them I am not biased. I am sure in this country most people have experienced a criminal justice system that most of the time is administered by people who are intelligent, well educated, not corrupt, and who act in good faith. And I believe that the reason that we can have an efficient domestic criminal justice system is that most people, including the accused, widely share in that assumption. Of course, there are always incidents of judicial misbehavior. But there are institutions to deal with judicial misbehavior. Never-

theless, the consensus is that the judicial system we deal with is fair. However, we can not export that assumption. Therefore, the Tribunals have to be able to demonstrate, as we operate, that we are not the mirror of the demented assumptions of ethnic cleansing. We have to demonstrate that we, as an international institution, do not have an agenda of punishing one group and favoring another. This is an extremely challenging proposition to accept for those who have lived all their lives surrounded by institutions which operate on a very different basis.

In addition, the Tribunals have to overcome the fact that we operate a criminal justice system in an environment that is profoundly lacking in one of the main pillars on which domestic criminal justice systems reside: a free media. The roots of the Anglo-Saxon model of criminal justice is that criminal justice is local. That concept is at the heart of the jury system. Only in extraordinary circumstances would courts grant a change of venue for a criminal trial to be held in a different jurisdiction. However, the ICTY sits in The Hague with respect to crimes committed in the former Yugoslavia. The ICTR sits in Arusha, Tanzania for crimes committed in Rwanda. In view of the location of the Tribunals we have to be able to bring criminal justice locally. You would think that with the kind of information technology at our disposal this should be a very easy task. Unfortunately, it is not an easy task. We live in an environment in which the work of the Tribunal is not portrayed locally (where it should matter the most) through the intervention of a free press and a free media. I think that in the case of the ICTY, it is devastating for the work of the Office of the Prosecutor to have so little input in the kind of information that is published and consumed domestically.

Finally, bench and bar ethics committees must be developed locally where the ICTY and the ICTR sit. I am concerned about the legislative power of these Tribunals. Currently, the rule-making power is in the hands of the judges. Moreover, I am not sure that there is a sufficiently broad-based consultation basis. For instance, the defense has no input, no formal way of making a contribution in the direction that the Tribunal's Rules of Evidence and Procedure could take. However, for those of us who believe that we come from a very dominant legal culture, accommodating different legal systems is a major challenge and contributes to the alienation of many who are interfaced with the Tribunal. In addition, one has to

grapple with the notion that the Tribunals are completely dominated by the Anglo-American common law system which has its own idiosyncrasies that are not easily explainable to others. In conclusion, there are many legal issues that have to be resolved with respect to the functioning of these Tribunals.